

*** NOT FOR PUBLICATION ***

NO. 25872

IN THE SUPREME COURT OF THE STATE OF HAWAII

TIMOTHY FOSTER JONES, Plaintiff/Counterclaim Defendant-
Appellant/Cross-Appellee

vs.

OWNERS AND OCCUPANTS OF ADJOINING LANDS; STATE OF HAWAII,
Defendant-Appellee/Cross-Appellant

HOWARD RUGGLES GREEN, WARREN JAY GUNDERSON and JAMES WALKER
AUSTIN, TRUSTEES OF THE JAMES WALKER AUSTIN TRUST DATED JUNE 7,
1985; RICHARD F. LERT and CARL E. YORK, JR., TRUSTEES OF THE
DANIEL J. FAIRBANKS III TRUST DATED OCTOBER 31, 1986; HOWARD
RUGGLES GREEN and WARREN JAY GUNDERSON, TRUSTEES OF THE SIANA
AUSTIN TRUST DATED JUNE 22, 1990 and TRUSTEES OF THE JAMES WALKER
AUSTIN III TRUST DATED JUNE 22, 1990,
Defendants/Counterclaimants-Appellees/Cross-Appellant

BURK W. JONES AND JOAN DIANE JONES, TRUSTEES UNDER THE BURK W.
JONES AND JOANIE D. JONES REVOCABLE LIVING TRUST AGREEMENT DATED
JANUARY 15, 1993, Defendants-Appellees

HEIRS AND ASSIGNS OF KAINIKI (k); HEIRS AND ASSIGNS OF
KALAWAIANUI (w); OFFICE OF HAWAIIAN AFFAIRS; HEIRS AND ASSIGNS OF
ANNIE LEI WINCHESTER (including LOWELL THOMAS YOON, WESLEY KAIWI
NUI YOON and FERN MAHEALANI YOON); HEIRS AND ASSIGNS OF MABEL
K.P. CUMMINGS (also known as Mabel G. Cummings and as Mabel Gahan
Cummings); HEIRS AND ASSIGNS OF MAPUANA NAILIMI (also known as
Mapuana Kishi); HEIRS AND ASSIGNS OF HELEN FULLER (also known as
Helen S. Fuller and as Helen Scott Fuller); and Heirs of persons
named above who are deceased, or persons holding under said
Heirs; HERBERT A.K. CAMPOS; HAUNANI CAMPOS OLDS; MARIELENA R.
MEYER; CHARLES PILA; HARRY G. CUMMINGS, JR.; MARGARET T.
CUMMINGS; IRENE MILILANI BISHAW, RUSSEL GEORGE KALEOLANI PHIFER,
JOHN K. PERREIRA aka JOHN KAWAI PERREIRA; DOE DEFENDANTS 4
THROUGH 100; and all persons or corporations unknown claiming any
right, title, estate, lien or interest in the real property
described in Plaintiffs' Complaint adverse to Plaintiffs'
ownership and TO ALL WHOM IT MAY CONCERN, Defendants

BURK W. JONES AND JOAN DIANE JONES, TRUSTEES UNDER THE BURK W.
JONES AND JOANIE D. JONES REVOCABLE LIVING TRUST AGREEMENT DATED
JANUARY 15, 1993, Plaintiffs/Counterclaim Defendants-Appellees

*** NOT FOR PUBLICATION ***

vs.

HOWARD RUGGLES GREEN, WARREN JAY GUNDERSON and JAMES WALKER AUSTIN, TRUSTEES OF THE JAMES WALKER AUSTIN TRUST DATED JUNE 7, 1985; RICHARD F. LERT and CARL E. YORK, JR., TRUSTEES OF THE DANIEL J. FAIRBANKS III TRUST DATED OCTOBER 31, 1986; HOWARD RUGGLES GREEN and WARREN JAY GUNDERSON, TRUSTEES OF THE SIANA AUSTIN TRUST DATED JUNE 22, 1990 and TRUSTEES OF THE JAMES WALKER AUSTIN III TRUST DATED JUNE 22, 1990,

Defendants/Counterclaimants-Appellees/Cross-Appellants

OWNERS AND OCCUPANTS OF ADJOINING LANDS; STATE OF HAWAII,
Defendant-Appellee/Cross-Appellant

TIMOTHY FOSTER JONES, Defendant/Counterclaim Defendant-
Appellant/Cross-Appellee

IRENE MILILANI BISHAW; RUSSEL GEORGE KALEOLANI PHIFER; JOHN K. PERREIRA (also known as John Kawai Perreira); HEIRS AND ASSIGNS OF NAKOKO (k); HEIRS AND ASSIGNS OF A. ROSA; OFFICE OF HAWAIIAN AFFAIRS; HEIRS AND ASSIGNS OF THEODORE DUDOIT (also known as Theodore Nawahine Dudoit); HEIRS AND ASSIGNS OF ANNE LEI WINCHESTER (including LOWELL THOMAS YOON, WESLEY KAIWI YOON and FERN MAHEALANI YOON); HEIRS AND ASSIGNS OF MABEL K. P. CUMMINGS (also known as Mabel G. Cummings and as Mabel Gahan Cummings); HEIRS AND ASSIGNS OF MAPUANA NAILIMA (also known as Mapuana Kishi); HEIRS AND ASSIGNS OF HELEN FULLER (also known as Helen S. Fuller and Helen Scott Fuller); and Heirs of persons named above who are deceased, or persons holding under said Heirs; HERBERT A.K. CAMPOS, HAUNANI CAMPOS OLDS, PATRICK CAMPOS, MARIELENA R. MEYER, CHARMAINE D. ARMITAGE; DOE DEFENDANTS 6 through 100; and all other persons or corporations unknown claiming any right, title, estate, lien or interest in the real property described in Plaintiffs' Complaint adverse to Plaintiffs' ownership and TO ALL WHOM IT MAY CONCERN, Defendants

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NOS. 98-0355 and 98-0358)

ORDER DISMISSING THE APPEAL IN PART AND REQUIRING RE-BRIEFING
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Upon review of the record, it appears that we do not have jurisdiction over Plaintiffs/Counterclaim Defendants/Appellants/Cross-Appellees Burk W. Jones, Joan Diane Jones and

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Timothy Foster Jones's (the Jones Appellants), Defendant/Appellee/Cross-Appellant Owners and Occupants of Adjoining Lands; State of Hawaii's (Cross-Appellant State), and Defendants/Counterclaim Plaintiffs/Appellees/ Cross-Appellants Howard Ruggles Green, Warren Jay Gunderson, James Walker Austin, Richard Lert, and Carl E. York, Jr.'s (the Austin Cross-Appellants), respective appeals from the April 9, 2003 amended judgments in the consolidated cases of Civil Nos. 98-0355(2) and 98-0358(2).

We note that the appealable final judgments in the consolidated cases are the April 2, 2003 judgments that the circuit court certified for appeal pursuant to Rule 54(b) of the Hawai'i Rules of Civil Procedure (HRCP). The April 9, 2003 amended judgments merely corrected clerical errors in the April 2, 2003 judgments and incorporated by reference two additional exhibits that further clarified the already existing descriptions of the subject real estate, and, thus, the amendments were not material, substantial, or adverse to the parties' rights or obligations. Consequently, the entry of the April 9, 2003 amended judgments did not postpone the time period for filing a notice of appeal from the April 2, 2003 judgments. See Poe v. Hawaii Labor Relations Bd., 98 Hawai'i 416, 418, 49 P.3d 382, 384 (2002) ("If, . . . the amendment . . . makes changes in the prior judgment which have no adverse effect upon those rights or obligations or the parties' right to appeal, the entry of the amended judgment will not postpone the time within which an appeal must be taken from the original decree." (Citations and internal quotation marks omitted)).

Even assuming, *arguendo*, an issue exists as to which set of judgments triggered the thirty-day time period for filing a notice of appeal under Rule 4(a)(1) of the Hawai'i Rules of Appellate Procedure (HRAP), the Jones Appellants did not file their June 6, 2003 notices of appeal within thirty days after

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entry of the April 2, 2003 judgments or the April 9, 2003 amended judgments, as HRAP Rule 4(a)(1) required. Cross-Appellant State and the Austin Cross-Appellants did not file their respective June 9 and June 19, 2003 notices of cross-appeal within either (a) fourteen days after service of a timely notice of appeal or (b) thirty days after entry of the April 2, 2003 judgments or the April 9, 2003 amended judgments, as HRAP Rule 4.1(b)(1).

The Austin Cross-Appellants' April 22, 2003 post-judgment motion for an award of costs and prejudgment interest did not extend the time period for filing a notice of appeal pursuant to HRAP Rule 4(a)(3), because the Austin Cross-Appellants did not file their April 22, 2003 post-judgment motion within ten days after entry of the April 2, 2003 judgments or the April 9, 2003 amended judgments, as HRAP Rule 4(a)(3) required.

Although the circuit court granted the Austin Cross-Appellants ex parte motion to extend the time period to file notices of appeal until June 9, 2003, the extension was without good cause. In the context of a request for an extension of time to file a notice of appeal pursuant to HRAP Rule 4(a)(4)(A), "good cause" exists only where the circumstances necessitating an extension "are beyond the control of the movant[.]" Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 351, 910 P.2d 116, 122 (1996). The record shows that the Austin Cross-Appellants' reason for requesting an extension under HRAP Rule 4(a)(4)(A) was merely that the parties were considering whether they would assert appeals and cross-appeals. These circumstances were well within the parties' control, and, thus, the Austin Cross-Appellants did not show "good cause" for an extension, as HRAP Rule 4(a)(4)(A) required. Cf. Hall v. Hall, 96 Hawai'i 105, 110 n.3, 26 P.3d 594, 599 n.3 (App. 2001) ("[A] desire for more time to seek settlement before incurring the cost of filing and appeal is not 'good cause' for extending the time

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to file a notice of appeal[.]”), affirmed in part, and vacated in part on other grounds, Hall v. Hall, 95 Hawai‘i 318, 319, 22 P.3d 965, 966 (2001). The circuit court, the Honorable Shackley F. Raffetto presiding, abused its discretion when it entered the May 1, 2003 order granting the Austin Cross-Appellants’ ex parte motion for an extension of time to file their notice of appeal. Therefore, the Jones Appellants June 6, 2003 notice of appeal, as well as Cross-Appellant State’s and the Austin Cross-Appellants’ respective June 9 and June 19, 2003 notices of cross-appeal, were not timely under HRAP Rule 4(a) and HRAP Rule 4.1(b). The failure of a party to file a timely notice of appeal or notice of cross-appeal is a jurisdictional defect that the parties cannot waive and an appellate court cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986); HRAP Rule 26(b) (“[N]o court or judge or justice thereof is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP].”).

Despite our lack of jurisdiction over the appeals and cross-appeals from the HRCP Rule 54(b) certified judgments, we have jurisdiction over the Jones Appellants’ appeal from the June 6, 2003 post-judgment order granting in part and denying in part the Austin Cross-Appellants’ post-judgment motion for an award of costs and prejudgment interest. “A post-judgment order is an appealable final order under HRS § 641-1(a) if the order ends the proceedings, leaving nothing further to be accomplished.” Ditto v. McCurdy, 103 Hawai‘i 153, 157, 80 P.3d 974, 978 (2003) (citation omitted). The June 6, 2003 post-judgment order ended the proceedings for the Austin Cross-Appellants’ post-judgment motion for costs and prejudgment interest related to the HRCP Rule 54(b) judgments, and left nothing further to be accomplished with respect to those limited post-judgment issues. Therefore, the June 6, 2003 post-judgment

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order was an appealable final post-judgment order. Based on an extended thirty-day period under HRAP Rule 26(a), the Jones Appellants filed their July 7, 2003 notices of appeal within thirty days after entry of the June 6, 2003 post-judgment order, as HRAP Rule 4(a)(1) required. Therefore, we have jurisdiction over the Jones Appellants' appeal from the June 6, 2003 post-judgment order granting in part and denying in part the Austin Cross-Appellants' post-judgment motion for an award of costs and prejudgment interest. Accordingly,

IT IS HEREBY ORDERED that the portions of this appeal that arise out of (1) the Jones Appellants' June 6, 2003 notices of appeal, (2) Cross-Appellant State's June 9, 2003 notices of cross-appeal, and (3) the Austin Cross-Appellants' June 19, 2003 notices of cross-appeal are dismissed for lack of appellate jurisdiction.

IT IS FURTHER ORDERED that:

(1) This appeal is limited to the Jones Appellants' July 7, 2003 notices of appeal from the June 6, 2003 post-judgment order granting in part and denying in part the Austin Cross-Appellants' post-judgment motion for an award of costs and prejudgment interest.

(2) All of the briefs that the parties have filed thus far in this appeal are stricken.

(3) Within forty days after the date of this order, the Jones Appellants shall file an opening brief in conformity with HRAP Rules 28(b) and 32 that addresses only the Jones Appellants' appeal from the June 6, 2003 post-judgment order granting in part and denying in part the Austin Cross-Appellants' post-judgment motion for an award of costs and prejudgment interest.

(4) The appellees shall thereafter file answering briefs in accordance with HRAP Rules 28(c) and 32.

(5) The Jones Appellants may thereafter file a reply

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brief in accordance with HRAP Rules 28(d) and 32.

Failure to comply with this order may result in sanctions.

DATED: Honolulu, Hawai'i, April 23, 2004.